IP 00-1898-C H/K Rochlin v. Cincinnati Ins. Co.
Judge David F. Hamilton Signed on 7/8/03

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ROCHLIN, ARLENE, SLOVER, MARY, LOUDERBACK, GAYLE, DEWEESE, DEBRA, COLLIER, KAREN, ALONSO, ELENA, AZURMENDI, JOHANNA, CHAMBERS, ALEXIS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED EMPLOYEES, DATENA, JUNE, Plaintiffs, vs. CINCINNATI INSURANCE CO, A SUBSIDIARY OF CINCINNATI FINANCIAL CORPORATION, Defendant.	)	CAUSE NO. IP00-1898-C-H/K

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ARLENE ROCHLIN, MARY SLOVER, GAYLE LOUDERBACK, DEBRA DEWEESE, KAREN COLLIER, ELENA ALONSO, JOHANNA AZURMENDI, and ALEXIS CHAMBERS, JUNE T. DATENA, individually and on behalf of all other similarly situated employees,	)	
Plaintiffs,	)	CAUSE NO. IP 00-1898-C H/K
v.	)	
CINCINNATI INSURANCE CO.,	)	
Defendant.	)	

ENTRY ON MOTION FOR RECONSIDERATION OF
CLASS CERTIFICATION AND RELATED MOTIONS

Plaintiffs are female employees of defendant Cincinnati Insurance Company ("CIC"). Plaintiffs bring this lawsuit pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. § 206(d), claiming that CIC treated its male employees preferentially in promotions and pay. Plaintiffs sought certification of a plaintiff class on the Title VII claims under Rule 23 of the Federal Rules of Civil Procedure and a conditional certification of a plaintiff class or collective action under 29 U.S.C. § 216(b) with respect to their Equal Pay Act claims.

That certification was granted by order of this court on March 21, 2002. On April 4, 2002, defendant filed a motion for the court to reconsider class certification. Defendant argued that the certification had been based on a clear factual error regarding the extent to which CIC's promotion decisions were centralized which affected the court's analysis of the Rule 23(b) predominance and superiority requirements. On April 19, 2002, the court granted defendant's motion indicating that it would reconsider the issue, but only after additional discovery had taken place. After extensive briefing on the issue (finally prompting an order from the court declaring a halt to all further submissions), the court now revisits the issue of class certification under Rule 23 of the Federal Rules of Civil Procedure with respect to plaintiffs' Title VII claims, and under 29 U.S.C. § 216(b) with respect to their Equal Pay Act claims. As explained below, the court vacates the prior certification of the Title VII class but leaves intact the opt-in class for plaintiff's Equal Pay Act claims. The Title VII claims of the named plaintiffs will proceed as a joined action pursuant to Rule 20, allowing permissive joinder.

The court should make whatever factual and legal inquiries are needed to ensure that the prerequisites and requirements for class certification are satisfied, even if the underlying considerations overlap the merits of the case. See *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001); *In re Bromine Antitrust Litigation*, 203 F.R.D. 403, 407 (S.D. Ind. 2001). Thus, while the court

has allowed some discovery to take place, see *Szabo*, 249 F.3d at 676, it expresses no view on the relative strength of the named plaintiffs' claims, and the court's findings are not definitive as to the merits on any claims.

Facts

I. *The Parties*

A. *CIC and its Structure*

CIC is a provider of insurance and related products and services. CIC is comprised of different departments, some of which are located in various parts of the country. The company is structured in a traditional, hierarchical design. At the top is the board of directors, which supervises John J. Schiff, Jr., Chief Executive Officer. Schiff Dep. 6-7; Huller Aff. ¶ 2. Below Schiff are Tim Timmel, Senior Vice President of Operations, and James Benoski, Senior Vice President of Headquarters Claims and Chief Insurance Officer. Benoski Aff. ¶ 1; Huller Aff. ¶ 2.

The named plaintiffs are employed in three different but related departments: the Headquarters Claims Department, the Legal Department, and the Field Claims Department. The Legal Department is further divided into two subdivisions, the Trial Division and the Insurance Operations Division. Timmel is in charge of the Legal Department and the Field Claims Department. Huller

¶ 2; see also Pl. Reply to Original Motion to Certify Ex. 19D (letter announcing that as of January 1, 1997, Timmel would have "executive responsibility for the following departments: Home Office Claims, Field Claims, Life Claims, Claims Legal, Education and Training, Personnel and Government Relations"). Benoski oversees the Headquarters Claims Department. Benoski Aff. ¶ 1. Either the Loss Committee or the Executive Committee is comprised of Schiff, Dean Dicke, Benoski, Michael Gagnon, Timmel, and Bruce Fisher. See Plaintiffs' Supp. App. Ex. 41.

The Legal Department, which Timmel oversees, is divided into two subdivisions: the Trial Division and the Insurance Operations Division. The Insurance Operations Division has only one attorney, Lisa Love. Mark Huller is the head of the Trial Division and reports directly to Timmel. Huller Aff. ¶ 1. The Trial Division defends law suits against CIC and its insureds. The Trial Division has ten law offices located in Ohio, Indiana, Alabama, Georgia, and Pennsylvania. Am. Cplt. ¶ 31.

Dean Dicke is the head of the Field Claims Department and also reports directly to Timmel. Dicke Aff. ¶ 1. The Field Claims Department employs field personnel from entry level claims representatives (also known as field adjusters) to regional field claims managers. Field Claims personnel do the actual leg work on filed insurance claims. The adjusters typically meet with the claimant in

person, take photographs and witness statements, and inspect the property. These employees work out of their homes without secretarial support, and they operate according to a field claims manual. Field Claims employees are not eligible for officer status unless they are transferred to another department. Dicke Aff. ¶¶ 3-5.

The Headquarters Claims Department, which Benoski oversees, reviews the claims files submitted by the Field Claims Department employees. If the claim goes to litigation, the Headquarters Claims Department employees continue in an oversight role while either a CIC attorney or an outside attorney works on the litigation. The Headquarters Claims Department is divided into operating divisions that specialize and deal only with a certain type of claim. Benoski Aff. ¶ 3-4. Each operating division reports to a different head who in turn reports to Benoski. *Id.*, ¶ 1.

Employees of both claims departments and the CIC attorneys "investigate claims by talking to witnesses, taking photographs, reviewing and obtaining police reports, [and] viewing the accident site." Rochlin Second Aff. ¶ 27. In addition, employees of both claims departments evaluate liability, damages, and settlement value of cases; prepare reports on the investigation of claims, evaluation of liability, damages and settlement value of cases; negotiate settlements; analyze,

review, and determine the coverage of a claim; and pursue subrogation on behalf of CIC. *Id.*

B. *The Named Plaintiffs*

Named plaintiff Arlene Rochlin began her employment with CIC in February 1994 as staff counsel in the Indianapolis office of the Legal Department's Trial Division. In July 1994, Rochlin became the managing attorney of the Indianapolis office. Am. Cplt. ¶ 37. At that time, Rochlin did not receive a raise or bonus. See *id.*, ¶ 38. In November 1995, Rochlin learned that when a CIC attorney was promoted to manager, he (the gender is used advisedly) normally received a $2,500 raise in salary. *Id.* When Rochlin inquired about the raise in December 1995, her supervisors informed her that they had "forgotten" about it. *Id.*, ¶ 39. Shortly thereafter, Rochlin received the raise. *Id.*

On April 13, 2000, Rochlin filed a complaint with the Equal Employment Opportunity Commission alleging sex discrimination. On September 27, 2000, she received a right to sue letter, and on December 8, 2000, she brought this suit. Also sometime in December 2000, Rochlin was recommended for promotion to Officer by Huller. In February 2001, approximately six weeks after she filed her original complaint in this action, Rochlin and one other female were promoted to officer in the Trial Division. They are the only female officers in that division. Rochlin believes that she should have been promoted sooner and that it was

Huller who failed to recommend her. Rochlin Dep. 163, 173.[1] In Rochlin's division, there are approximately 40 male attorneys and 7 or 8 female attorneys. Rochlin Dep. 244.

In 1997, Rochlin's name was on the "short list" to become an officer, and Pat Corrigan's name was not. Huller Dep. 147-48. Corrigan's name first appeared on the "short list" to become officer in 1998. Cf. *id.* at 148. In 1999, Corrigan began receiving consistent marginal evaluations regarding his timeliness in reporting, including one that indicated outside counsel had been fired for similar conduct. See, *e.g.*, Pl. Supp. App. Ex. 57, at 000715. However, Corrigan was elected as an officer before Rochlin. Rochlin Dep. 201.

Robert Haemmerle, associate manager of claims development, testified that the only problem he ever had with Rochlin was the timeliness of her reporting. Haemmerle Dep. 40. However, he also testified that timeliness was a problem with all of the attorneys due to the amount of workload. *Id.*

Named plaintiff Gayle Louderback works in the Life and Health operating division of the Headquarters Claims Department and believes that she should have been promoted. Louderback Dep. 81. She also testified that between 1986

[1]All references to the Rochlin deposition are to the July 10, 2001 deposition unless otherwise noted.

and 1989, men were being brought into the department and promoted, while the women who were already employed in the department were not being promoted. *Id.* at 82. The men who were brought in from the field were given other benefits such as paid insurance, company cars, paid phones, all of which the women did not receive. *Id.* However, Louderback also testified that in her particular department, no new employees have been brought in from the field in approximately ten years. *Id.* at 82-83. After having a meeting with Benoski about being promoted, Benoski informed her that she would need a recommendation from Larry Arlen, the manager of the Life and Health operating division to gain a promotion. *Id.* at 79. Upon learning that information, Louderback testified, she knew she would not get the promotion because "Arlen [did] not care" for her. *Id.* It appears that Louderback eventually did receive some kind of bonus, but the record evidence is not clear on when that took place. *Id.* at 110 (indicating receipt of bonus sometime in or after the year 2000).

Named plaintiff Mary Slover is a supervising claims examiner in Region 6 of the Casualty operating division of the Headquarters Claims Department. She too feels that she should have been promoted. See Slover Dep. 130-31. While Slover did interview for a supervisory position in Region 2, she informed her supervisors that she thought her best chances for advancement would be in Region 6 where the growth rate was higher. See *id.*

The caseload of an examiner is double that of a supervisor. *Id.* 51-52. Slover believes that at times the quality of her work suffers as a result of that high caseload. *Id.* Slover also feels that there is an inequitable distribution of work. Lynn Hovekamp has close to 300 cases and works part-time, and Slover, who is full-time, has 400 cases. *Id.* at 37, 52. By comparison, Tim Fitz has approximately 200 cases. *Id.* at 52. When Hovekamp and Slover were transferred into Region 6 under Norm Kirkpatrick, they were instructed to maintain the case files from their previous region in addition to taking on additional cases from the new region. See *id.* However, Fitz, who was transferred from the Personal Lines Department,"did not carry his cases with him." *Id.* Slover testified that she and Hovekamp both talked with Kirkpatrick about the size of their caseloads compromising the quality of their work. *Id.* at 52-53.

Named plaintiffs Karen Collier and Debra DeWeese both work in supervisory positions in the Workers' Compensation division of the Headquarters Claims Department. John Ringstrom is the immediate supervisor of both. Ringstrom, in turn, reports to Benoski. Collier believes that she should have been promoted, and that it was Ringstrom's decision not to recommend her. See Collier Dep. 99. The evidence in the record indicates, however, that at least in Collier's case Benoski was aware of Collier's desire to be promoted and Ringstrom's refusal to recommend her. See *id.* at 92-93.

In 1999 plaintiff DeWeese applied for and was turned down for a supervisory position. The position was awarded instead to a male co-worker. DeWeese Dep. 71-73. DeWeese testified that it was the practice of the company to bring male workers into the Headquarters Claims Department from the field, and within two years, "automatically" promote them to a supervisory position. *Id.* at 73. She further testified that promotions occurred much more frequently for male employees than for female employees. *Id.*

The three remaining named plaintiffs, Alexis Chambers, Johanna Azurmendi, and Elena Alonso, work in the Workers' Compensation office in Norcross, Georgia. Chambers is a supervising claims examiner. Azurmendi and Alonso are senior claims examiners. Ringstrom is the immediate supervisor of all three. See Chambers Dep. Ex. 7 (employee evaluation signed by Ringstrom as supervisor). All three claim that they have been discriminated against based on their gender. See Azurmendi Dep. 108 (stating that with her more extensive education and experience, she should be further along than males in the department, and stating concern over pay differential); Am. Cplt. ¶ 12.

II. *Promotions*

A. *The Procedure*

To be considered for a promotion or salary increase, a CIC employee's immediate supervisor must recommend him or her. Upon receiving the recommendation, Timmel, in the case of Legal and Field Claims Departments employees, and Benoski, in the case of Headquarters Claims Department employees, must approve the nomination. Timmel Dep. 110; Benoski Dep. 43; see also Slover Dep. 216; Huller Dep. 148-49. At least in the case of officer nominations, once the nomination is approved, the recommendation goes to CEO Schiff, who takes it to the board of directors for final approval. Timmel Dep. 110. Some evidence indicates that no one receives a promotion without first being recommended by his or her immediate supervisor. See *id.*; Benoski Dep. 43; Rochlin Dep. 18; Louderback Dep. 79. Only after the recommendation has been made does the higher level of management either approve or disapprove the recommendation. See Timmel Dep. 110; Benoski Dep. 43; Rochlin Dep. 18; Louderback Dep. 79.

Huller testified that he instituted a performance evaluation system in which he would talk with each attorney at least once a year and explain what he or she could do better. However, there are no written policies concerning the awarding of bonuses or promotions. See Huller Dep. 21-22 (based on oral evaluation,

attorneys should have known what they needed to do individually to achieve officer status); see also Louderback Dep. 83 (no written job descriptions and no written criteria for advancements).

CEO Schiff testified that he is unaware of any written materials that would describe the various positions, salary ranges of those positions and possibilities for advancement. Schiff Dep. 134-36. He also testified that he is unaware of whether the company handbook is distributed to all employees. *Id.* at 143-44. According to Schiff, pay and promotions are determined by the heads of each department. *Id.* at 163, 143-44 (also stating that he is unaware that salary ranges exist for associates).

In addition, there is no written description of what it takes for an employee to become an officer. Timmel Dep. 112; Haemmerle Dep. 18-19; Louderback Dep. 83; see Huller Dep. 21-22. Each manager, such as Huller, has discretion whether to recommend the candidate to Timmel. Timmel testified that he is unaware of whether the evaluation system currently in place was ever communicated to the attorneys. Timmel Dep. 134-35. This procedure, or perhaps lack thereof, is also consistent with the testimony of the named plaintiffs.

Named plaintiff Louderback testified that she went to Timmel in 1998 or 1999 and asked him what it took for a female to be promoted within the company.

She testified that Timmel responded by stating that the company is a "good old boy's club" and "a white man, white collar company." Louderback Dep. 92; but see Timmel Dep. 156 (acknowledging conversation with Louderback concerning gender discrimination and stating, "I'm sure I told her that we would investigate."). Louderback also asked Benoski what criteria CIC considered in promoting employees to the position of officer. Louderback Dep. 79. Benoski allegedly responded that there were none. *Id.* It was Louderback's understanding that upper management would not disclose to her or other employees what criteria were used in determining whether an employee would become an officer or be promoted. *Id.*

When named plaintiff Rochlin inquired about the process to become an officer in November 2000, Huller, her manager, informed her that he "played a significant role in the process," but he would not discuss exactly what that process was. Huller Dep. 141.

Robert Haemmerle is associate manager of claims development. Haemmerle Dep. 20. Haemmerle testified that he has never seen anything in writing describing the process or qualifications needed to become an officer or receive any other kind of promotion. *Id.* at 19. In fact, Haemmerle testified that he personally does not know what the qualifications are for becoming an officer. *Id.* at 18-19.

In the case of officer nominations, the head of the division prepares a "short list" of candidates that he believes are qualified. See, *e.g.*, Huller Dep. 148-49. The idea behind the "short list" is to communicate to upper management (*i.e.*, Timmel or Benoski) who the head of the division believes would be a good candidate for officer. *Id.* at 149. With respect to the Legal Department, Timmel and Huller discuss the lawyers in the department on a regular basis. *Id.* at 150. Based on those discussions and the short list, Timmel makes the final decision as to who is presented to CEO Schiff as a candidate for officer. See, *e.g.*, *id.* at 152-53 (discussing memos from Huller to Timmel regarding officer nominations).

B. *Interaction with Management*

Promotion decisions are based on collaboration among management at different levels. See, *e.g.*, Plaintiffs' Supp. App. Exs. 21, 23. On occasion, CEO Schiff would "write personal notes to people that" he encountered and felt had done a noteworthy job. See Huller Dep. 189. Schiff testified that he would sometimes participate in conversations with upper management regarding hiring practices, though he stated that he did not recall making a specific agenda with respect to gender or race. Schiff Dep. 161. However, it is reasonable to infer that he discusses recommendations for officer positions with management. See *id.* at 160-61.

In addition, Benoski appears to be heavily involved in recognizing and rewarding employees for outstanding work, suggesting a fair amount of involvement in not only the day to day operations of the division but also in the selection of employees for reward and promotion. See, *e.g.*, Plaintiffs' Supp. App. Exs. 41-44 & 46 (letters from Benoski and others in upper management giving awards and bonuses for good work). Benoski also sent letters informing employees that they were receiving a raise. *Id.*, Ex. 43.

Timmel and Benoski were aware that some employees were raising issues of sex discrimination in the promotion process. See Benoski Dep. 203. In early 1998, an anonymous letter from female claims employees was sent to Timmel raising concerns of sex discrimination in promotions and pay. Plaintiffs' Supp. App. Ex. 54. The letter stated that it was sent to Timmel instead of Benoski because there was a fear of raising these issues "with the person who signs our paycheck." *Id.* Among other things, the letter stated that females were treated as a "second class" in that "[t]heir salaries and perks are inconsistent with those of male counterparts; they are given inferior office space; promotional opportunities are not made equally available; workloads are not equitable distributed; and most egregious, they are not respected and generally ignored." *Id.* The letter also stated that when these concerns are raised by an individual, she is labeled a "bitch." *Id.*

Approximately two months later, Timmel told Benoski that he planned to meet with a group of examiners and asked Benoski to tell his "managers not to get paranoid about this." Plaintiffs' Supp. App. Ex. 55, at 026783. Timmel said he felt that the conversations were "healthy for the department." *Id.*

In addition, there are a number of letters in the record announcing increases in starting salaries for all employees. There are also several letters indicating that additional compensation was paid to a number of "selected individuals," and that the additional compensation was to be kept strictly confidential. See, *e.g.*, *id.*, Exs. 17, 31, 32; see also *id.*, Ex. 29 (male employee receiving mid-year raise and not told that he is making more than rest of class). The only letters in the record awarding the secret additional compensation are addressed to male employees. Letters in the record addressed to female employees notified them only that a change in trainee salaries had taken place. See, *e.g.*, *id.*, Ex. 33.

III. *Comparative Salaries*

Women are employed in higher numbers, both statistically and in actual numbers, at the lower levels of CIC. Women are employed in the greatest numbers as claims representatives, claims specialists, and senior claims specialists. See Pl. Resp. Br. at 26. Men hold 90 percent of the top ten job categories which, on average, pay the highest salaries. In at least some instances,

men who hold lower ranking positions, and thus presumably lower paying positions, are actually paid more than the females who supervise them. Pl. Resp. Br. at 26 n.12; see also Pl. Supp. App. Ex. 56.

Named plaintiffs DeWeese and Collier work in Cincinnati. Ringstrom Aff. ¶¶ 3-4. DeWeese is employed as a supervising claims examiner and earns $47,644. Plaintiffs' Supp. App. Ex. 56. Collier is employed as a supervisor of workers' compensation claims and earns $64,727. *Id.* Louderback is employed as a manager of the Life and Health Claims Department and earns $50,417. *Id.* Named plaintiffs Chambers, Alonso, and Azurmendi are all employed in the Norcross, Georgia office. *Id.* Alonso and Azurmendi are both senior claims examiners. Alonso earns $48, 284, and Azurmendi earns $47,190. *Id.* Chambers is employed as a supervising claims examiner and earns $50,399. *Id.*

CIC employs 158 people as claims representatives. Of that number, 49 are female. There are 164 claims specialists. Of that number, 45 are female. There are 114 people employed as senior claims specialists. Of that number, 22 are females. The vast majority of the salaries for that position fall somewhere between $45,000 and $52,000. *Id.* The highest paid person in the department is a male. *Id.*

There are no men employed as supervising claims examiner. See *id.* The salaries for those positions are: $40,284; $40,353; $43,777; $44,092; $45,819; $50,399; $51,138. See *id.* The position immediately below supervising claims examiner is that of senior claims examiner. CIC employs four men and nine women as senior claims examiners. See *id.* The men employed as senior claims examiners earn $43,020; $44,095; $48,892; $49,168. See *id.* By comparison, the women are paid $35,208; $38,399; 42,722; $43,437; $45,137; $46,927; $48,455. See *id.* (salaries of remaining two women unknown).

In at least one instance a male employee who has an identical job title as a female employee but who has less CIC seniority earns more than the female who has more CIC seniority. *Id.* In some instances, males with inferior job titles earn more than counterpart females with a superior job title. *Id.* Rochlin testified that Pat Corrigan would be considered one of her male counterparts. Rochlin Dep. 244. In 1998, Corrigan had been an attorney for seven years and had been an attorney with CIC for three years. Plaintiffs' Third Supp. App. Ex. 2. By comparison Rochlin had been an attorney for nine years and had also been with CIC for three years. *Id.* However, in 1997, Corrigan earned approximately $2,426 more than Rochlin. *Id.*

Preliminary Matters and Motions to Strike

Before addressing the issue of class certification, the court addresses three preliminary matters. Plaintiffs have moved to strike defendant's reply brief for exceeding the page limit set by court order and to strike certain affidavits. CIC has requested leave of the court to submit deposition testimony referenced in its reply brief and has requested leave to file a response to plaintiffs' surreply.

I. *Plaintiffs' Motions to Strike*

Plaintiffs' have moved to strike the affidavits of Mark Huller, Lisa Love, and James Benoski because CIC denied plaintiffs the opportunity to take their depositions. Plaintiffs then took their depositions, so this motion is denied as moot.

On November 1, 2002, defendant submitted a motion and memorandum for leave to file a reply brief in excess of the 20 page limit set by Local Rule 7.1(b). Defendant requested an additional 40 pages, bringing the total length to 60 pages. On November 4, 2002, this court issued an order stating that defendant could submit a reply brief "not to exceed 40 pages, exclusive of summary, tables, and exhibits." On November 13, 2002, defendant submitted its reply, totaling 96 pages, including summary, argument, appendix, and exhibits. Plaintiffs filed a

motion to strike defendant's reply brief for exceeding the page limit set forth by this court's order. That motion is granted in part.

Defendant's reply brief consisted of the following: a seven page summary, numbered i through vii; a table of contents, numbered viii through ix; a table of authorities, numbered x through xiv; argument, numbered 1 through 38; an Appendix A containing eight pages of endnotes in fine print; and five "exhibits" (A through E), all containing additional factual information and argument. Appendix A reads as if all authorities containing parentheticals were removed from the body of the text and placed in endnotes in tiny 8-point font. Exhibits A through E contain additional argument, in the form of charts, paragraphs, and even a discussion of plaintiffs' use of statistical evidence.

When viewing defendant's reply brief as a whole, the court infers that defendant intentionally attempted to evade this court's direct order that the reply brief *not* exceed 40 pages. Rather than actually edit a 60-page brief down to 40 pages, defendant chose simply to remove large portions of the argument and to label them as "exhibits" and "appendix" in an attempt to appear to comply with the letter of the court's order. That is not the customary or intended use of the term "exhibits" in motions practice or the court's order. The material in the "appendix" and "exhibits" should have been contained in the brief, if anywhere. Plaintiffs' motion to strike is granted in part. The appendix and exhibits will be

stricken from the record. The court has considered only the numbered pages 1 through 38 of defendant's reply brief. The court has not read, nor will it read or consider any other part of the reply brief. Their preparation was a waste of time and money.[2]

II. *Defendant's Motions for Leave to File Additional Materials*

Defendant filed a motion for leave to file a response to plaintiffs' surreply. On October 9, 2002, this court issued an order stating that as of November 14, 2002, no further briefing or submissions related to the motion for reconsideration were to be filed without good cause being shown and leave of the court being granted. On November 27, 2002, plaintiffs submitted a motion for leave to file a surreply to the 96-page reply brief that defendant had previously submitted. On December 4, 2002, this court granted that motion, and plaintiffs' surreply was accepted for filing.

On December 13, 2002, defendant filed its "Motion for Leave to File a Response to Plaintiffs' Surreply to Defendants' Motion to Reconsider the Entry on Class Issues and Related Motions." In support, defendant argued: (1) as the

[2]For defendant's future reference in this case, future briefs shall be double-spaced with at least 12-point font (text and footnotes) with page margins of at least one inch on all sides, and shall comply with applicable page limits. Future abuse of these limits by defendant will result in financial sanctions against counsel.

proponent of the original motion, defendant should be entitled to "the final word"; and (2) defendant has filed "fewer pages of briefing" than the plaintiffs and "equity requires that CIC have an equal opportunity to set forth its legal position."

Not only does this argument ignore this court's order of October 9, 2002, stating that additional briefing be submitted only for good cause shown, but it flies in the face of standard civil procedure and local rules. Because defendant submitted additional evidence with its excessively long reply brief, plaintiffs were entitled to respond in a surreply as a matter of elementary fairness. Local Rule 56.1, which deals with motions for summary judgment, expressly provides for such surreplies to address new evidence submitted on reply. The same principle of fairness applies here. It does not entitle defendant to add to the growing chaos of this case by filing additional briefs on the theory that it should have the "final word." Defendant's motion is denied. The brief, attached as an exhibit to defendant's motion, has not been considered.

Finally, defendant has filed a motion for leave to file deposition testimony referenced in its reply brief. Defendant is resubmitting this testimony after it failed to comply with Local Rule 26.2 in its original submission by submitting complete deposition transcripts, resulting in an order from this court rejecting the supporting evidence and returning it to defendant. This motion will be granted only to the extent that the deposition transcripts are referenced within the text of

pages 1 through 38 of defendant's reply brief. To the extent that they are referenced elsewhere, including endnotes, and exhibits, the motion is denied.

Legal Discussion

I. *Certification of Title VII Class Under Rule 23*

To certify a class under Rule 23, plaintiffs must first satisfy all four elements of Rule 23(a): (1) the class is too numerous to join all members; (2) there exist common questions of law or fact; (3) the claims or defenses of representative parties are typical of those of the class members; and (4) the representative parties will fairly and adequately represent the class. Fed. R. Civ. P. 23(a). Once these requirements are satisfied, the plaintiff must also satisfy one of the subsections of Rule 23(b). The party seeking class certification bears the burden of proof in establishing each of the requirements under Rule 23. See *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982); *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993). A plaintiff's failure to satisfy any one of these elements precludes certification. *Retired Chicago Police Ass'n*, 7 F.3d at 596.

The proposed Title VII class is defined as: "All current and former female claims department employees and female attorneys who acted as in-house counsel

employed by Cincinnati Insurance Company at any time from November 1998 to March 22, 2002." Pl. Motion to Approve Notice to Class Ex. A at 2.[3]

The parties have conducted limited discovery, and the court now revisits its previous entry granting class certification. See *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001) (court may make any factual inquiries necessary in determining whether to grant class certification). The court will not repeat its previous discussion of the merits of the Rule 23(a) requirements, which are all satisfied here. The issue is whether plaintiffs have met the requirements of Rule 23(b).[4]

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[3]This was the court's definition to deal with a "fail-safe" problem with plaintiffs' original definition.

[4]With respect to the adequacy of the named plaintiffs, CIC has renewed its arguments that plaintiff Rochlin, as in-house counsel, cannot adequately represent the class because she has an ethical duty to CIC as her client. As previously stated, this court is not aware of any ethical obligations that preclude a private employee-attorney from asserting her own federally protected rights. See *Kachmar v. SunGard Data Systems, Inc.*, 109 F.3d 173, 179-82 (3d Cir. 1997) (rejecting similar theory that former in-house counsel could not sue employer because suit would implicate client confidences); *Breckinridge v. Bristol-Myers Co.*, 624 F. Supp. 79, 82 (S.D. Ind. 1985) ("A lawyer . . . does not forfeit his rights simply because to prove them he must utilize confidential information. Nor does the client gain the right to cheat the lawyer by imparting confidences to him."), quoting *Doe v. A Corp.*, 709 F.2d 1043, 1050 (5th Cir. 1983); see also *Douglas v. Dyn McDermott Petroleum Operations Co.*, 163 F.3d 223, 223-24 (5th Cir. 1998) (Dennis, J., dissenting from denial of rehearing *en banc*) ("ethical rules cannot be asserted to preclude a lawyer's access to courts for the adjudication of his personal rights and tenable legal claims against his former employer"); cf. *Rand v. CF Industries, Inc.*, 42 F.3d 1139, 1145 (7th Cir. 1994) (employer's decision to fire attorney given "special deference" in age discrimination case because client must have confidence in attorney and client's right to discharge attorney was implicated). While the Fifth Circuit has addressed whether an attorney may serve

(continued...)

Plaintiffs contend they can satisfy both Rule 23(b)(2) and Rule 23(b)(3), but they acknowledge that because they seek substantial monetary compensation, Rule 23(b)(3) with its opt-out procedure is best suited for this case. See *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 899 (7th Cir. 1999) (if "money damages sought by the plaintiff class are more than incidental to the equitable relief" sought, "district court should either certify the class under Rule 23(b)(3) for all purposes or bifurcate the proceedings – certifying a Rule 23(b)(2) class for equitable relief and a Rule 23(b)(3) class for damages"); *O'Brien v. Encotech Const. Services, Inc.*, 203 F.R.D. 346, 351 (N.D. Ill. 2001) (class certification under Rule 23(b)(2) generally not appropriate when party primarily seeks monetary relief).

Under Rule 23(b)(3), the court must determine whether the common questions of fact or law predominate over issues affecting the individual members and whether a class action is superior to other available methods for fair and efficient adjudication of the controversy. Relevant factors include the interest of individual class members in controlling prosecution of their cases; the extent and nature of any pending litigation of the controversy; the desirability or undesirability of concentrating the litigation in the particular forum; and the difficulties likely to be encountered in managing a class action.

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[4](...continued)
as a named plaintiff in a class action such as this, the court need not address that issue at this time. The plaintiffs' Rule 23 class is decertified for other reasons, so the issue is moot. See *Doe v. A Corp.*, 709 F.2d 1043 (5th Cir. 1983).

In *Amchem Products, Inc. v. Windsor*, the Supreme Court addressed the issue of predominance in a case involving a settlement proposal related to asbestos claims. 521 U.S. 591 (1997). In *Amchem*, the district court had conditionally certified a class defined as "all persons who had not filed an asbestos-related lawsuit against a . . . defendant as of the date the action was commenced, but who (1) had been exposed – occupationally or through the occupational exposure of a spouse or household member – to asbestos or products containing asbestos attributable to a . . . defendant, or (2) whose spouse or family member had been so exposed." *Id.* at 602. The district court had concluded that the predominance requirement "was satisfied based on two factors: class members' shared experience of asbestos exposure and their common 'interest in receiving prompt and fair compensation for their claims . . . .'" *Id.* at 622.

In affirming the Third Circuit's reversal of the district court, the Supreme Court stated that the "Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623. "Even if Rule 23(a)'s commonality requirement may be satisfied by that shared experience [of exposure to asbestos], the predominance criterion is far more demanding." *Id.* at 623-24. "Given the greater number of questions peculiar . . . to individuals . . ., and the significance of those uncommon questions, any overarching dispute about" whether defendants had engaged in the alleged conduct could not satisfy the Rule 23(b)(3) predominance standard. *Id.* at 624;

see also *Monahan v. City of Wilmington*, 49 Fed. Appx. 383, 384, 2002 WL 31341336, *2 (3d Cir. October 18, 2002) (affirming denial of class certification where plaintiffs alleged discrimination in promotions and other matters; "questions as to whether an individual plaintiff suffered discrimination by the Police Department and, if so, whether the discrimination against that plaintiff encompassed promotions and overtime, . . . raise issues pertaining only to individuals").[5]

In its motion to reconsider, defendant argues that the individualized issues each class member presents will predominate over the common issues, especially in light of the Civil Rights Act Amendments of 1991. Prior to the 1991 amendments, Title VII class actions alleging intentional discrimination, if certified, proceeded under Rule 23(b)(2) because "the Civil Rights Act of 1964 allowed for very little relief beyond injunctive and declaratory relief." *Miller v. Hygrade Food Products Corp.*, 198 F.R.D. 638, 640 (E.D. Pa. 2001), citing *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 243 (3d Cir. 1975), and *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998). Two aspects of the 1991 amendments are critical here.

[5] *Monahan* is an unpublished decision with no precedential value under the Third Circuit's rules. Nevertheless, recent employment discrimination cases dealing with promotion classes are few and far between, and this court has found the district court's and circuit court's analysis instructive. In essence, in light of the Third Circuit's rules, this court is treating the circuit court's opinion as if it were a district court decision, which has no precedential value but which may be persuasive or instructive.

First, the 1991 amendments added the remedies of compensatory and punitive damages to suits for intentional discrimination. Second, the 1991 amendments allowed for jury trials in such suits. Especially in a proposed class challenging promotion decisions, these changes present high hurdles for class certification. At least in the absence of explicitly discriminatory promotion policies, the individual aspects of each promotion decision must be tried. A decision about one class member's claim would not govern a decision about any other class member's claim. Perhaps for these reasons, post-1991 litigation classes alleging intentional discrimination and seeking a monetary award are rare. The parties have identified for the court only one such class certified under Rule 23(b)(3), *Warnell v. Ford Motor Co.*, 189 F.R.D. 383 (N.D. Ill. 1999) (certifying a Rule 23(b)(2) and (b)(3) class of plaintiffs who were alleging a hostile working environment under Title VII resulting from allegedly company-wide harassment). Phrased differently, Rule "23(b)(3) treatment is inappropriate where litigation would ultimately 'degenerate in practice into multiple lawsuits separately tried.'" *Miller*, 198 F.R.D. at 643, quoting Fed. R. Civ. P. 23(b)(3) Advisory Notes to 1966 Amendments.

In support of class certification for their promotion claims, plaintiffs argue that CIC uses highly centralized decision-making for promotions and has a culture of gender discrimination. Despite CIC's denials, the record evidence does indicate that the decision-making process was highly centralized, even though

many important decisions, such as the recommendations for promotion given to upper management, were made by different people. Timmel was in charge of two of the departments and Benoski was in charge of one. While the managers recommended people to be promoted, both Benoski and Timmel were highly involved in the activities of their departments. Some evidence in the record suggests that in the case of officers, a "short-list" was presented to Timmel (and presumably Benoski as well), and he decided from that list who would be promoted to officer in any given year. Thus, it is likely that both Benoski and Timmel were highly involved in the promotions and salary awarding decisions of their departments. Two people making these decisions and being involved in the day to day operations to the degree that Timmel and Benoski were could be viewed as a highly centralized business environment.

As indicated in this court's previous entry on class certification, the issue of predominance in this case is for plaintiffs at best a close one. Promotion classes are probably the least promising candidates for class treatment, at least in the absence of an explicitly discriminatory policy, which would be very rare these days. The issue of predominance is also one of degree and goes to the very heart of class certification. After considering the further discovery results and the parties' briefing, the court concludes ultimately that predominance is lacking here. The class action would not resolve issues central to the disposition of the case. Resolution of the named plaintiffs' claims would determine CIC's liability only to

those named plaintiffs. Separate "mini-trials" – equivalent to full trials of individual claims – would still be needed to determine whether CIC discriminated against any other female class members regarding promotions.

Individual circumstances of alleged discrimination will predominate over the common scenarios that occurred with each plaintiff. While there are undoubtedly numerous common issues of law and fact concerning the plaintiffs' allegations of discrimination, resolving the issue of liability with respect to any named plaintiff simply will not bind or determine the issue of liability for any of the remaining class members. As a result, those common issues of fact and law do not predominate over the numerous issues that relate only to individual plaintiffs, and the requirements of Rule 23(b) have not been met. The Title VII class is decertified, and the court will consider the claims of individual plaintiffs, which may be tried together.

II. *Permissive Joinder*

Rule 20(a) allows permissive joinder of claims "arising out of the same transaction, occurrence, or series of transactions or occurrences [when] . . . any question of law or fact common to all these persons will arise in the action." Fed. R. Civ. P. 20(a). Thus, two requirements must be satisfied before joinder may occur: "First, there must be a right to relief arising out of the same transaction or occurrence, or series of transactions or occurrences. Second, there must be a

question of law or fact common to all the plaintiffs." *Barner v. City of Harvey*, 2003 WL 1720027, *2 (N.D. Ill. 2003) (granting defendants' motion to sever because plaintiffs' pattern or practice claims had been rejected by a jury and plaintiffs were terminated for different reasons). Rule 20 was designed to promote trial convenience and to expedite the resolution of disputes, thereby preventing multiple lawsuits. *Mosley v. General Motors Corp.*, 497 F.2d 1330, 1332 (8th Cir. 1974). As a result, in addition to the requirements of Rule 20, a court may consider "'other relevant factors in a case in order to determine whether the permissive joinder of a party will comport with the principles of fundamental fairness.'" *Chavez v. Illinois State Police*, 251 F.3d 612, 632 (7th Cir. 2001), quoting *Intercon Research Assoc., Ltd. v. Dresser Indus., Inc.*, 696 F.2d 53, 58 (7th Cir. 1982). "Federal policy favors joinder, and the district court has wide discretion when deciding whether joinder of parties is proper." *Hawkins v. Groot Indus., Inc.*, 210 F.R.D. 226, 230 (N.D. Ill. 2002) (allowing permissive joinder because the complaint referred to "discrimination during the same general time period, allege[ed] the same type of adverse employment actions, . . . the same type of discrimination (race), and . . . accuse[ed] the same set of supervisors at the same work location") (citations omitted); *Chavez*, 251 F.3d at 632.

With respect to the requirement that the events arise "out of the same transaction, occurrence, or series of transactions or occurrences," the word "transaction" has been given a "flexible meaning." *Mosley*, 497 F.2d at 1333. A

"transaction" can encompass "a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." *Mosley*, 497 F.2d at 1333. "Accordingly, all 'logically related' events entitling a person to institute a legal action against another generally are regarded as comprising a transaction or occurrence." *Id.*; see also *Hawkins*, 210 F.R.D. at 230 ("allegations of a 'system of decision-making'" sufficient to satisfy both elements of Rule 20(a)).

In *Mosley v. General Motors*, ten African American plaintiffs alleged that General Motors had a policy of discriminating against black employees. 497 F.2d at 1331. The ten plaintiffs had raised claims of discrimination ranging from racial discrimination in promotions and pay, retaliatory discharge, and failure to hire, to sex discrimination for failure to hire and in granting relief time. *Id.* Concluding that the claims had little relationship to one another, the district court had ordered the claims severed. *Id.* at 1332.

The Eighth Circuit reversed, stating that "a company-wide policy purportedly designed to discriminate against blacks in employment . . . arises out of the same series of transactions or occurrences." *Id.* at 1334, citing *United States v. Mississippi*, 380 U.S. 128, 142-43 (1965) (authorizing joinder of defendant registrars who were allegedly a part of a state-wide system denying

African American citizens of Mississippi the right to vote). The Eighth Circuit stated:

> Since a "state-wide system designed to enforce the registration laws in a way that would inevitably deprive colored people of the right to vote" was determined to arise out of the same series of transactions or occurrences, we conclude that a company-wide policy purportedly designed to discriminate against blacks in employment similarly arises out of the same series of transactions or occurrences.

Mosley, 497 F.2d at 1333-34, quoting *Mississippi*, 380 U.S. at 142-43.

In this case, plaintiffs allege "discrimination during the same general time period, allege the same type of adverse employment actions, allege the same type of discrimination . . ., and appear generally to accuse the same set of supervisors at the same work location, all factors favoring joinder." *Hawkins*, 210 F.R.D. at 230. Plaintiffs have alleged they were victims of a pattern of company-wide discrimination by senior management in promotion based on gender. Thus, plaintiffs have satisfied the first requirement for joinder. (Although plaintiffs have worked in different locations, they allege discrimination in CIC's company headquarters.)

The second requirement that plaintiffs must satisfy is that a question of law or fact must be common to all parties. Fed. R. Civ. P. 20(a); *Mosley*, 497 F.2d at 1334. "The rule does not require that all questions of law and fact raised by the dispute be common. Yet, neither does it establish any qualitative or quantitative

test of commonality." *Mosley*, 497 F.2d at 1334. In *Mosley*, the Eighth Circuit held that alleged discriminatory conduct satisfied the second requirement, stating that the "discriminatory character of the defendants' conduct is thus basic to each plaintiff's recovery. The fact that each plaintiff may have suffered different effects from the alleged discrimination is immaterial for the purposes of determining the common question of law or fact." *Id.*; see also *Alexander v. Fulton County*, 207 F.3d 1303, 1324 (11th Cir. 2000) (evidence that plaintiffs were "subject to a *systemic* pattern or practice of race-based discrimination" sufficient for joinder; fact that plaintiffs "suffered different effects – in this case, discrimination in promotions, transfers, assignments, or discipline – from the alleged policy of discrimination did not preclude the trial court from finding a common question of law and fact") (emphasis in original); *Hawkins*, 210 F.R.D. at 230 ("allegations of the African-American and Hispanic plaintiffs involve the same issues of law and fact, such as whether defendants' conduct amounts to a hostile work environment in violation of Title VII or § 1981"). But see *Bailey v. Northern Trust Co.*, 196 F.R.D. 513, 515-16 (N.D. Ill. 2000) (African American females brought claims under Title VII and Section 1981 against former employer alleging race discrimination but not alleging that the defendant had a common discriminatory practice or policy; granting defendant's motion to sever because plaintiffs' claims did not arise out of the same transaction or occurrence and did not have common questions of fact or law).

In this case, as indicated above, plaintiffs have alleged a company-wide policy of discrimination against women. Even though proof of the discrimination will necessarily involve the various work records of each plaintiff, there is likely to be "substantial overlap in the evidence presented." *King v. Pepsi Cola Metropolitan Bottling Co.*, 86 F.R.D. 4, 6 (E.D. Pa. 1979) (denying motion to sever because plaintiffs alleged a general and pervasive policy of discrimination). While there are three departments involved, plaintiffs have introduced evidence that all departments share similar job functions and that two people were in charge of those departments and responsible for the alleged discriminatory conduct. Thus, given the indication of centralized decision-making, there will be considerable overlap in the evidence presented for each individual plaintiff regarding qualifications for promotion, what information was generally available to all employees regarding those qualifications, and who made those decisions, as well as other relevant information. Thus, plaintiffs have satisfied the second requirement for joinder.

CIC correctly points out that each plaintiff's case will present issues of sex discrimination that will be unique to that individual plaintiff. These differences add some weight to the argument against joinder, though they weigh more heavily against class certification. Nevertheless, given the common decision-makers and the common allegations of company-wide sex discrimination in promotions, the court finds that joinder is proper here. The risk of confusion and possible

prejudice to defendant can be minimized with careful jury instructions. Federal courts regularly call upon juries in criminal trials to make careful and separate decisions about joined criminal charges in multi-defendant cases that present challenges far greater than any that might be presented here.

III. *Conditional Class Certification – Equal Pay Act Section 216 Class*

A. *29 U.S.C. § 216(d)*

Plaintiffs also seek conditional certification for a collective action under the Equal Pay Act, 29 U.S.C. § 206(d). Remedies for violations of the Equal Pay Act are the same as those for violations of the Fair Labor Standards Act. Under 29 U.S.C. § 216(b), "an action . . . may be maintained against any employer . . . in any federal or state court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." Rule 23 does not govern a class action brought under the Equal Pay Act since the collective action for violations of the FLSA is inconsistent with the procedures under Rule 23. *Ameritech Ben. Plan Committee v. Communication Workers of America*, 220 F.3d 814, 820 (7th Cir. 2000); see also *Vanskike v. Peters*, 974 F.2d 806, 812-13 (7th Cir. 1992); *Woods v. New York Life Ins. Co.*, 686 F.2d 578, 579-80 (7th Cir. 1982). Section 216(b) bars the use of an opt-out class, but it permits what amounts to an opt-in procedure: "No employee shall be a party plaintiff to any such action unless he gives his consent in writing

to become such a party . . . ." The procedures set forth in Section 216(b) preempt the class action procedure set forth in Rule 23. *King v. General Electric Co.*, 960 F.2d 617, 621 (7th Cir. 1992).

Courts are split as to the proper method for deciding whether to certify a class under Section 216(b). Essentially, there are two approaches. The first employs the elements set forth in Rule 23 to the extent those elements do not conflict with Section 216 (*i.e.*, numerosity, commonality, typicality, and adequacy of representation). *E.g.*, *Garcia v. Elite Labor Serv., Ltd.*, 1996 WL 559958, *2 (N.D. Ill. Sept. 30, 1996); *Shushan v. Univ. of Colorado at Boulder*, 132 F.R.D. 263, 265 (D. Colo. 1990). This approach is based on the assumption that "Congress did not intend to create a completely separate class action structure for the FLSA and ADEA context." *Mooney v. Aramco Serv. Co.*, 54 F.3d 1207, 1212-16 (5th Cir. 1995).[6]

The second and less stringent approach requires the court to engage in a preliminary review to determine if there are persons "similarly situated" to the plaintiffs and to describe accurately the group of such persons to whom notice ought to be directed. A two-step procedure is used. First, notice is sent to

[6]As enacted in 1938, the FLSA authorized collective actions. In 1947, as part of the "Portal-to-Portal Act" to limit the scope of the FLSA, Congress amended 29 U.S.C. § 216(b) to limit collective actions by requiring that each employee give written consent to becoming a party. Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84, § 5 (1947), available at 1947 U. S. Code Cong. Serv. 81.

potential class members. Then, after discovery is completed, the court determines whether the class should be restricted based on the "similarly situated" requirement of the FLSA. *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 358-59 (D.N.J. 1987). The basis of the second approach is that "in contrast to class actions under Rule 23, members of the FLSA representative action 'opt in'; therefore, the stricter Rule 23 test is irrelevant and unnecessary because, at this stage, the potential class is uncertain and self selective." *Garza v. Chicago Transit Auth.*, 2001 WL 503036, *2 (N.D. Ill. May 8, 2001), citing *Woods*, 686 F.2d 578, 579 (7th Cir. 1982); accord, *Jackson v. Go-Tane Servs. Inc.*, 2000 WL 1221642, *3 (N.D. Ill. Aug. 21, 2000) (declining to apply Rule 23 to FLSA collective action).

CIC argues that there is no evidence that plaintiffs are similarly situated to any potential class members because they have only produced "raw 'average' salaries for various arbitrary groups of male and female employees." Def. Reply Br. at 24. CIC further argues that if the court were to adopt the more lenient standard in *Lusardi*, then the court should address the issue as if notice had already been approved and the court were faced with a discernable class. Neither argument is persuasive.

The Seventh Circuit has not specifically addressed the standard to be used in determining whether potential plaintiffs are similarly situated in a Section 216(b) representative action. In *Moss v. Crawford & Co.*, another district court

case facing similar issues, the court had previously conditionally certified a potential class that included both permanent and temporary employees. 201 F.R.D. 398, 400-01 (W.D. Pa. 2000). The defendant's primary business involved "insurance adjustment and risk management." *Id.* at 400. The class members all worked as adjusters on either the Ashland or the Exxon Valdez oil spill projects. *Id.* at 401. As a result, some workers were located in Pennsylvania and others were located in Alaska. *Id.* In addition, the clients in Alaska and Pennsylvania were billed at different rates. *Id.* However, the plaintiff-employees received a flat 50% of the amount billed to the client. *Id.*

In denying the defendant's motion to decertify the class, the court noted: "Although the FLSA does not define the term 'similarly situated', courts generally do not require prospective class members to be identical." *Id.* at 409. The court then applied the two-step analysis established in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987). "During the first or 'notice stage', the court examines pleadings and affidavits in the record to determine whether notice should be given to potential class members." *Moss*, 201 F.R.D. at 409 (citations omitted). "'Because the court has minimal evidence, this determination is made using a fairly lenient standard, and typically results in 'conditional certification' of a representative class.'" *Id.*, citing *Mooney v. Aramco Serv. Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995). The court went on to state that once "discovery is complete and more factual information is available to the court, the defendant may file a

motion to decertify the class." *Moss*, 201 F.R.D. at 409. At that point, "the court uses a higher standard to analyze the similarly situated issue." *Id.*

Furthermore, the court in *Moss* did not even consider the three main factors (which are currently being disputed in this case) to determine whether class certification was appropriate until after discovery and the defendant had petitioned to decertify the class. See *id.* Those three factors were: "(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to [the] defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations." *Id.*, citing *Thiessen v. General Electric Capital Corp.*, 996 F. Supp. 1071, 1080 (D. Kan. 1998). In analyzing those factors, the court concluded that the "variations in the plaintiffs' duties, job locations and hourly billing rates [did] not differentiate the collective basis of the class to the extent that it defeat[ed] the primary objectives of a § 216(b) action." *Moss*, 201 F.R.D. at 410.

The same reasoning applies to this case. At the "notice stage," the plaintiffs' burden is not to prove their entire case. While defendant is correct in that some discovery has taken place, "the potential class [remains] uncertain and self selective." *Garza v. Chicago Transit Authority*, 2001 WL 503036, *2 (N.D. Ill. May 8, 2001), citing *Woods v. New York Life Ins. Co.*, 686 F.2d 578, 579 (7th Cir. 1982). The plaintiffs have come forward with evidence tending to indicate that "at

least some" female employees were paid less than their equally qualified male counterparts, and that those employees are similarly situated to plaintiffs. See *Krieg v. Pell's, Inc.*, 2001 WL 548394, *1 (S.D. Ind. March 29, 2001) (conditionally certifying class at the notice stage of litigation).

Accordingly, the court conditionally certifies a class defined as current and former female employees of the Headquarters Claims and Field Claims Departments, as well as female attorneys who acted as in-house counsel employed by defendant at any time from November 1998 to March 22, 2002.

B. *Discovery of Names*

As noted, in a representative action pursuant to Section 216(b), a potential class member must opt in to the class rather than opt out of the class. *Woods*, 686 F.2d at 580. Since the motion for conditional class certification is granted, plaintiffs are entitled to discover the names and addresses of other potential plaintiffs. *Hoffmann-LaRoche Inc. v. Sperling*, 493 U.S. 165, 170 (1989) (district courts have the authority to permit the discovery of the names and addresses of potential class members in § 216(b) representative actions); *Severtson v. Phillips Beverage Co.*, 137 F.R.D. 264, 267 (D. Minn. 1991) (remanding for reconsideration under different standard magistrate's approval of notification; noting that if notice is warranted, discovery of names and addresses of potential plaintiffs should be allowed).

Defendant shall produce to plaintiffs a list of the names and last known addresses of individuals who fall within the defined class no later than August 7, 2003.

C. *Proposed Equal Pay Act Class Notification*

The court has provided its own form of notice which shall be used. See Ex. A, attached. Defendant's objections are therefore moot. Furthermore, because the Title VII Rule 23 class is being decertified, the proposed notice that plaintiffs have submitted in conjunction with that class is not approved.

IV. *Plaintiffs' Second Motion to Amend Complaint*

On January 14, 2003, plaintiffs filed a second motion to amend their complaint. CIC opposed the motion. Plaintiffs seek to add as a named plaintiff June T. Datena. Datena is a Field Claims Representative, and was a member of the previously certified class.

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend shall be freely given when justice so requires. There is no evidence that the amendment has been unduly delayed or would cause unfair prejudice to the opposing party. See *Chavez v. Illinois State Police*, 251 F.3d 612, 631-33 (7th Cir. 2001) (denying motion to amend complaint after discovery had closed and trial

date had been set); see also *Sanders v. Venture Stores, Inc.*, 56 F.3d 771, 774 (7th Cir. 1995) (affirming denial of motion to amend after close of discovery where amendment would have prejudiced defendant).

CIC argues that Datena fails to state a claim because she does not make a sufficient factual allegation in the amended complaint. CIC also argues that because Datena did not file an EEOC charge, amending the complaint to add her as a named plaintiff would be futile because her allegations are not sufficiently similar to those of Rochlin, who did file an EEOC charge. CIC's arguments are not persuasive with respect to whether to allow the amendment. The court grants plaintiffs' motion to amend the complaint.

While the bulk of events listed in Datena's affidavit occurred outside of the time period covered by the alleged but now decertified class, Datena alleges in the proposed amended complaint that she suffered injury at the hands of defendant in that she was denied equal pay and promotions based on her gender. See Am. Cplt. ¶¶ 12, 13, 22 (alleging that Detena is an employee of CIC, that she was discriminated against based on her gender, and that her claims "arise out of the same transactions or occurrences as those claimed by Rochlin"). CIC argues that Datena fails to state a claim upon which relief can be granted because she does not make any further factual allegations. However, "we must remember, . . . that the Federal Rules of Civil Procedure are based on the concept of notice pleading.

It is sufficient if the complaint adequately notifies the defendants of the nature of the cause of action." *Duda v. Board of Educ. of Franklin Park Public Sch. Dist. No. 84*, 133 F.3d 1054, 1057 (7th Cir. 1998), citing *Conley v. Gibson*, 355 U.S. 41, 48 (1957), and *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). Datena's allegations sufficiently state a claim for relief. See *Duda*, 133 F.3d at 1057 (reversing district court's denial of motion to amend complaint). If CIC needs more detail, it can seek it through discovery.

"It is not necessary that each class member have filed a charge with the EEOC; however, only those who could have filed a charge at or after the time a charge was filed by the class representative can be included in the class." *Movement for Opportunity and Equality v. General Motors Corp.*, 622 F.2d 1235, 1248 (7th Cir. 1980) (citations omitted). Also, it is well settled under Title VII that "plaintiffs who have not timely filed a charge can rely on the timely charge of another plaintiff in a class action *or* in a multiple plaintiff joint action." *Anderson v. Montgomery Ward & Co.*, 852 F.2d 1008, 1017-18 (7th Cir. 1988) (emphasis in original); see also *Alexander v. Fulton County*, 207 F.3d 1303, 1324, 1333 (11th Cir. 2000) (affirming joinder of plaintiffs who all sought relief "based on the same series of discriminatory transactions by the same decision-maker in the same department during the same short time frame"). "This rule, however, presupposes that the claims of the non-filing plaintiffs arise out of a sufficiently similar discriminatory treatment as those claims brought before the EEOC, thus

enabling the employer to receive adequate notice and an opportunity to participate in conciliation." *Allen v. City of Chicago*, 828 F. Supp. 543, 556 (N.D. Ill. 1993).

In addition to Rochlin, named plaintiffs Slover, Louderback, DeWeese, Collier, Alonso, Azurmendi, and Chambers have all filed charges with the EEOC alleging "company-wide/systemic discrimination based on gender." Am. Cplt. Exs. 1-4, 9-11. The allegations range from a disparity in pay and bonuses to unequal treatment in benefits and day to day activities. See, *e.g.*, Am. Cplt. Ex. 4 (Collier's reserve increases are reviewed by supervisors whereas male counterparts' are not; male employees receive greater benefits such as company cars, whereas female employees do not).

Datena alleges in her affidavit that she was discriminated against based on her gender in that her male counterparts received greater benefits than she. See Datena Aff. ¶¶ 4 (job duties include inspecting roofs, and Datena's request for a ladder was denied while male counterpart was provided with a ladder in order to perform same inspections), 5 (refusal to reassign claim to another co-worker when claimant began sexually harassing Datena), 6-7 (workers' compensation claim resulting from work related injuries denied while male counterpart's workers' compensation claim resulting from softball injury honored), 9 (supervisor asked if Datena knew of anyone who could replace former employee, stating, "'preferably a male, because of the baby thing'"). These allegations are sufficiently similar to

those raised by the other named plaintiffs who have filed charges with the EEOC. Thus, the court grants plaintiffs' second motion to amend the complaint and has added Datena to the caption in this case.

V. *Plaintiffs' Motion for Defendant to Show Cause*

Plaintiffs filed a motion seeking an order that defendant show cause why it should not be sanctioned for alleged violations of Rule 4.2 of the Indiana Rules of Professional Conduct and for alleged violations of Rule 33 of the Federal Rules of Civil Procedure. The motion was filed on January 6, 2003.

Rule 4.2 of the Indiana Rules of Professional Conduct states that "a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Ind. R. Prof. Conduct 4.2. Rule 33 deals with interrogatories and the manner in which they may be served on opposing parties. Plaintiffs argue that CIC impermissibly attempted to contact a member of the class represented by plaintiffs' counsel without prior permission concerning matters related to the pending litigation.

The motion stems from an series of events that occurred in CIC's Life and Health Claims Department in August and November 2002. The Life and Health Claims Department has fourteen employees, including Larry Arlen, the head of

that department. Louderback Aff. ¶ 5. Of those fourteen employees, eleven would qualify as unnamed plaintiffs in the Title VII class under plaintiffs' proposed definition, and one other, Louderback, is a named plaintiff. Thus, the department is comprised of twelve female employees out of a total of fourteen.

On August 8, 2002, Connie Weber, a female employed with CIC as a claims examiner in the Life and Health Claims Department, wrote a letter to Arlen, her supervisor. Def. Resp. to Motion to Show Cause Ex. B. In that letter, she explained that she had been a good employee for almost 29 years and stated that she had not had a promotion in 26 years. *Id.* She stated that she wanted to know what it took to receive a promotion and explained that morale in her department (Life and Health Claims) was low. *Id.* Several other letters were written, all from women in the Life and Health Claims Department, expressing similar concerns. See Def. Resp. to Motion to Show Cause Exs. C (letter from Penny Kenny, stating that she had not received a promotion since 1988), D (letter from Pam Blauvelt, stating that she had not received a promotion in six years), E (letter from Chantelle R. Diersing, stating that she had not received a promotion in five and a half years, despite taking on added responsibilities and titles of other positions).

On November 2, 2002, Arlen wrote a letter to Gayle Louderback, and all other individuals in the Life and Health Claims Department. Louderback Aff. ¶ 2, 4. Defendant argues that this letter was in response to the letters that Arlen had

received from the various employees of the Life and Health Claims Department. It briefly discusses the structure of the department and indicates that "in recognition of the recent inquiries," he would conduct a review of that structure. Def. Resp. to Motion to Show Cause Ex. A. Enclosed with the letter was a questionnaire that the employees were to fill out and return to Arlen by November 15, 2002. *Id.* The questionnaire included some of the following questions:

> 4. Who do you report to and what is the extent of your interaction with your immediate supervisor?
>
> 5. Please indicate the regularity or percentage of time devoted on a weekly (or other applicable time) basis to particular job duties.
>
> * * *
>
> 7. Have your duties changed within the last five years?
>
> * * *
>
> 11. Have you received written instructions or directions from the Manager of Life Claims or the Manager of Health Claims changing (increasing or decreasing) your job duties in the last 5 years? If so, attach copies.
>
> 12. Are you responsible for managing employees within either Life Claims or Health Claims?
>
> 13. If you are not a manager, do you feel you exercise any "oversight" or "lead" any responsibility? If so, please explain.
>
> 14. What was your previous job title, if applicable?
>
> 15. Please list in detail job duties you performed under that job title.

16. Please indicate the regularity or percentage of time devoted on a weekly (or other applicable time) basis to the particular job duties in your previous job title.

Def. Resp. to Motion to Show Cause Ex. A. Plaintiffs argue that this questionnaire amounts to an impermissible attempt to circumvent Rule 33 of the Federal Rules of Civil Procedure, which governs the use of interrogatories. Plaintiffs also argue that this questionnaire circumvents Rule 4.2 of the Indiana Rules of Professional Conduct in that defendant was attempting to elicit information concerning this litigation from parties represented by counsel.[7]

An attorney may not communicate on the subject matter of the representation with a party that he knows is represented by counsel. Ind. Rule Prof. Conduct 4.2. Furthermore, class members who have not opted out are deemed to be represented by class counsel. See, *e.g.*, *Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1207-08 (11th Cir. 1985) ("defense counsel had an ethical duty to refrain from discussing the litigation with members of the class as of the date of class certification"). However, courts have also recognized that communications with class members in the ordinary course of business are permissible and appropriate. See, *e.g.*, *Cobell v. Norton*, 212 F.R.D. 14, 20 (D.D.C. 2002) (finding that defendants acted improperly by sending notices to class

[7]To the extent that the alleged conduct was carried out by defense counsel who are licensed in Ohio, there is a similar provision in the Ohio Code of Professional Responsibility. See Ohio Disciplinary Rule 7-104.

members that had the effect of extinguishing those members' rights to a full and accurate accounting, but allowing defendants "to continue engaging in the regular sorts of business communications with class members that occur in the ordinary course of business"); *Montgomery v. Aetna Plywood, Inc.*, 1996 WL 189347, *4 (N.D. Ill. July 2, 1996) (opinion on reconsideration prohibited communications about the litigation but refused to prohibit "communications necessary to conduct the daily business" of employer); *Resnick v. American Dental Ass'n*, 95 F.R.D. 372, 377 (N.D. Ill. 1982) (granting protective order to restrict communications, but noting: "And to the extent communications with class members (who are after all employees of counsel's client) are necessary for [defendant's] non-litigation-oriented business matters, such communications will not of course be inhibited by this Court.").

The communications that are the focus of this matter are internal communications related to the normal course of business. While answers to the questionnaire might turn out to be related to the litigation at hand, the questionnaire was created in direct response to letters sent to management from employees. If nothing else, it indicates a willingness on the part of CIC to identify and address a perceived internal problem. Plaintiffs' motion is denied.[8]

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[8]The plaintiffs have raised two troubling allegations, though plaintiffs do not seek specific action on them at this time. First, plaintiff has produced some evidence that e-mail communications concerning Rochlin's nomination to become an officer were not produced during discovery and came to light only after an (continued...)

Conclusion

For the foregoing reasons, plaintiffs' Rule 23 class is decertified. The Title VII claims of the named plaintiffs will proceed as a joined action pursuant to Rule 20, allowing permissive joinder. Plaintiffs' Section 216(b) class under the Equal Pay Act remains conditionally certified and notice to all potential plaintiffs will conform to the notice the court has attached to this entry. Defendant shall provide counsel for plaintiffs with a list of the names and last known addresses of all potential Equal Pay Act plaintiffs no later than August 7, 2003. Finally, plaintiffs' motion to show cause for circumvention of ethical rules is denied.

So ordered.

Date: July 8, 2003_____

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

[8](...continued)
anonymous source disclosed them to her. See, *e.g.*, Rochlin Third Aff. Ex. A. Second, plaintiffs have alleged that defendant CIC has ignored requests for document production. Especially in light of defendant's flouting of procedural rules discussed in this entry, such conduct, if proven, will not be tolerated.

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P.O. Box 10
Noblesville, IN 46060

NOTICE OF LAWSUIT UNDER THE EQUAL PAY ACT OF 1963

TO: Present and Former Female Employees of Cincinnati Insurance Company Who Worked in Either the Headquarters Claims Department, the Field Claims Department, or as an attorney in the Legal Department at any time from November 1998 to March 22, 2002.

RE: Equal Pay Act Lawsuit Filed Against Cincinnati Insurance Company

I. *Introduction*

The purpose of this Notice is to inform you of the existence of a collective action lawsuit in which you may be "similarly situated" to the named plaintiffs, to advise you of how your rights may be affected by this suit, and to instruct you on the procedure for participating in this suit if you decide that you wish to do so.

II. *Description of the Lawsuit*

Plaintiffs Arlene Rochlin, Mary Slover, Gayle Louderback, Debra DeWeese, Karen Collier, Elena Alonso, Johanna Azurmendi, Alexis Chambers, and June Datena have brought this lawsuit against defendant Cincinnati Insurance Company ("CIC") on behalf of themselves and all other past and present female employees of CIC who worked in either the Headquarters Claims Department or the Field Claims Department, or as an attorney in the Legal Department between November 1998 and March 22, 2002, and who have not received compensation equal to that of their equally qualified male counterparts. Plaintiffs claim that this action violated the federal Equal Pay Act of 1963.

Plaintiffs claim that they are entitled to recover twice the amount of their actual damages and reasonable attorney's fees and costs because they claim that the actions of CIC were willful. This lawsuit is currently in the early pretrial stage. CIC has denied Plaintiffs' allegations.

III. *Who May Join the Lawsuit?*

The named plaintiffs seek to sue on behalf of themselves and also on behalf of other employees who are "similarly situated" with respect to the case. Specifically, plaintiffs seek to sue on behalf of any female employees who were employed at any time between November 1998 and March 22, 2002, in either the Headquarters Claims Department or the Field Claims Department, or as an attorney in the Legal Department.

EXHIBIT A

IV. *Your Right to Participate in this Suit*

If you are a female who was employed at any time between November 1998 and March 22, 2002, in either the Headquarters Claims Department or the Field Claims Department, or as an attorney in the Legal Department, you may join this suit by filling out, signing and mailing and delivering the attached "Notice Of Consent To Become A Party Plaintiff" form to plaintiff's counsel at the following address:

CINCINNATI INSURANCE COMPANY CLASS ACTION LITIGATION
ATTN: Michael K. Sutherlin, Esq.
The Law Office of Michael K. Sutherlin & Associates
P.O. Box 441095
Indianapolis, Indiana 46222-1095

The Consent Form must be delivered no later than **[insert specific date 60 days after notice mailed].** If you fail to return the Consent Form to plaintiff's counsel by that date, you may not be able to participate in this lawsuit. That means you bear the risk of any non-delivery or delay in delivery of the Consent Form.

If you file a Consent Form, your continued right to participate in this suit may depend upon a later decision by the District Court that you and other Plaintiffs are actually "similarly situated" in accordance with federal law.

V. *Effect of Joining This Suit*

If you choose to join in the suit, you will be bound by the final decision on the case, whether it is favorable or unfavorable. While this suit is proceeding, you may be required to respond to written questions, sit for depositions, testify in court, or any combination of those things.

The attorneys for the Plaintiffs' class may be entitled to receive the payment of attorneys' fees and costs from the defendant in this lawsuit should there be a recovery or judgment in plaintiffs' favor. If there is no recovery or judgment in Plaintiffs' favor, you will not be responsible for any attorneys' fee. If there is a recovery, the attorneys for the class will receive a part of any settlement obtained or money judgment entered in favor of all members of the class. By joining this lawsuit, you designate the class representatives as your agents to make decisions on your behalf concerning the litigation and the method and manner of conducting this litigation. These decisions and agreements made and entered into by the representative plaintiffs will be binding on you if you join this lawsuit.

If you desire, you may also retain a lawyer of your choice and have that lawyer enter an appearance in this case.

VI. *No Legal Effect in Not Joining This Suit*

If you choose not to join this suit, you will not be affected by any judgment or settlement rendered in this case, whether favorable or unfavorable to the class. If you choose not to join in this lawsuit, you are free to file your own lawsuit.

VII. *No Retaliation Against You Is Permitted*

Federal law prohibits CIC from discharging you from employment or taking any other adverse employment action against you because you have exercised your legal right to join this lawsuit or because you have otherwise exercised your rights under the Equal Pay Act.

VIII. *Your Legal Representation If You Join*

If you choose to join this suit and you return the "Notice Of Consent To Become A Party Plaintiff" form by **[insert specific date 60 days after notice mailed]**, your interests will be represented by the named plaintiff through their attorneys as counsel for the class. Counsel for the class are:

Michael K. Sutherlin, Esq.
The Law Office of Michael K. Sutherlin & Associates
P.O. Box 441095
Indianapolis, Indiana 46222-1095
(317) 634-6313

Jennifer L. Graham, Esq.
342 Massachusetts Avenue, Suite 500
Indianapolis, Indiana 46204

IX. *Inspection of Papers and Questions*

Should you wish to inspect or examine the papers and court documents that have been filed thus far, you may do so in person at the Clerk's Office of the Federal District Court for the Southern District of Indiana, Indianapolis Division, which is located at 46 East Ohio Street, Room 105, Indianapolis, Indiana.

Further information about this Notice or the deadline for filing a Consent Form or other questions about this lawsuit may be obtained by writing or telephoning Plaintiff's counsel at the number and address stated above.

This Notice and its Contents Have Been Authorized by the United States District Court for the Southern District of Indiana. The Court Has Taken No Position in this Case Regarding the Merits of Plaintiffs' Claims or of Defendant's Defenses. Other than to Review the Court File or this Case, Please Do Not Contact the Court or the Clerk of the Court Directly.

NOTICE OF CONSENT TO BECOME A PARTY PLAINTIFF IN A COLLECTIVE ACTION UNDER THE EQUAL PAY ACT

By my signature below: (1) I represent to the Court that I am a female who was employed by Cincinnati Insurance Company at some time between November 1998 and March 22, 2002, in either the Headquarters Claims Department or the Field Claims Department, or as an attorney in the Legal Department, and (2) I hereby authorize the filing and prosecution of this Equal Pay Act action in my name and on my behalf by the above representative plaintiffs and designate those class representatives as my agents to make decisions on my behalf concerning the litigation, the method and manner of conducting this litigation, and all other matters pertaining to this lawsuit.

Date: _____

_____
Signature

_____
Printed Name

_____

_____
Street Address

_____
City, State, Zip

_____
Telephone Number

Mail To:

Michael K. Sutherlin, Esq. (Counsel for Plaintiffs)
The Law Office of Michael K. Sutherlin & Associates
P.O. Box 441095
Indianapolis, Indiana 46222-1095
(317) 634-6313

To be effective, this notice must be received by Mr. Sutherlin no later than **[insert specific date 60 days after notice is mailed].**